

OCTOBER 24, 2006

REGULATION #61 WORKGROUP MEETING

TO: Regulation 61 Stakeholders
FROM: Dave Akers and Janet Kieler, WQCD
RE: Potential Changes/Clarifications to Regulation #61 Based upon EPA Review for Continued Program Delegation

EPA recently hired an outside contractor to review the delegated states' permitting programs to ensure that they are consistent with (as stringent as) the corresponding federal requirements. EPA suggested some areas where changes or clarifications in Colorado's regulations would be helpful to ensure consistency with the federal regulations. We are optimistic that several of the issues identified by EPA will not require any changes to our regulations. To that end, we are planning to meet with EPA in the near future for a more detailed discussion regarding our legal analysis. The items below are those that EPA noted for which we believe some changes or clarifications in Regulation #61 may be necessary.

1. Requests for Permit Modifications by "Interested Persons"

ISSUE: EPA notes that Colorado's regulations do not provide specific opportunity for "interested persons" to request a permit modification as required by the federal regulations.

FEDERAL REQUIREMENT:

40 CFR § 124.5(a) provides, in pertinent part:

(a) . . . Permits . . . may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in §§ 122.62 or 122.64 (NPDES) All requests shall be in writing and shall contain facts or reasons supporting the request.

COLORADO'S CURRENT REQUIREMENT AND SUGGESTED CHANGE:

Section 61.8(8) of the CDPS Regulations outlines the various situations which may lead to modification of a permit. Section 61.8(8)(a) simply states that “A permit may be modified in whole or in part for the following causes...” Section 61.8(8)(b) lists the circumstances whereby a permit may be modified, including when the Division has received information that was not available at the time of permit issuance. See § 61.8(8)(b)(ii). This could be read to imply that a third party may come to the Division with new information to request a change in the permit terms. Neither of these provisions specifies who may request permit modifications; they contain no prohibition against requests coming from “interested persons,” nor do they state that modification requests must come from permittees.

Section 61.8(8)(c) specifically allows permittees to request permit modification or termination if certain conditions are met, and section 61.8(8)(g) follows up on this concept stating that: “The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination does not stay any permit condition.” If the issue were to arise, the Division would be obligated to read our current regulations as providing the opportunity for interested persons to request permit modifications. Sections 61.8(8)(c) and 61.8(8)(g) might be good places to clarify our intent by simply inserting “or an interested person” after “permittee” in both subsections.

2. Time to Request a Public Hearing (Meeting) on a Draft Permit

ISSUE: EPA points out that Colorado regulation only requires fifteen days notice in advance of a public meeting on a draft permit, whereas the federal requirement is thirty days.

FEDERAL REQUIREMENT:

40 CFR § 124.10(b)(2) states:

(b)(2) Public notice of a public hearing [on a draft permit] shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

COLORADO’S CURRENT REQUIREMENT AND SUGGESTED CHANGE:

Section 25-8-502(3)(b) of the WQCA and sections 61.5(3)(b) of the CDPS Regulations provide for only a 15 day public notice period before a public hearing (meeting) on a draft permit. For consistency with the federal requirement, both statutory and regulatory amendments need to occur to extend the notice time frame to 30 days.

3. Denial of a Request for a Permit Modification

ISSUE: EPA did not identify a specific issue here with respect to these procedures. EPA only requested that we review our procedures for consistency with 40 CFR § 124.5(b-d).

FEDERAL REQUIREMENT:

40 CFR § 124.5(b-d) state, in pertinent part:

(b) [NOT APPLICABLE TO STATE PROGRAMS] If the Director decides the request [for permit modification, revocation and reissuance, or termination] is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts. The Environmental Appeals Board may direct the Regional Administrator to begin modification, revocation and reissuance, or termination proceedings under paragraph (c) of this section. The appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it. This informal appeal is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of EPA action in denying a request for modification, revocation and reissuance, or termination.

(c) . . .

(1) If the Director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.62 (NPDES) . . . she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, other than under 40 CFR 270.41(b)(3), the Director shall require the submission of a new application. . . .

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any

revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) "Minor modifications" as defined in §§ 122.63 (NPDES) . . . are not subject to the requirements of this section.

(d)

(1) If the Director tentatively decides to terminate: A permit under . . . § 122.64(a) (NPDES) of this chapter . . . (for EPA-issued NPDES permits, only at the request of the permittee), or a permit under § 122.64(b) (NPDES) of this chapter where the permittee objects, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6 of this chapter.

(2) For EPA-issued NPDES . . . permits, if the Director tentatively decides to terminate a permit under § 122.64(a) (NPDES) of this chapter, other than at the request of the permittee, . . . he or she shall prepare a complaint under 40 CFR 22.13 and 22.44 of this chapter. Such termination of NPDES . . . permits shall be subject to the procedures of part 22 of this chapter.

(3) In the case of EPA-issued permits, a notice of intent to terminate or a complaint shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under §§ 123.24(b)(1) (NPDES) of this chapter In addition, termination of an NPDES permit for cause pursuant to § 122.64 of this chapter may be accomplished by providing written notice to the permittee, unless the permittee objects.

COLORADO'S CURRENT REQUIREMENTS AND SUGGESTED CHANGE:

Section 61.8(8) (specifically subsections (d)(f) and (g)) outlines Colorado's procedures for permit modification, suspension, revocation and reissuance, and termination. We believe that these provisions satisfy the federal requirements in 40 CFR § 124.5(c) and (d).

One of the federal provisions that EPA cited, 40 CFR § 124.5(b) (in italics, above), is not a delegation requirement, as it is not applicable to State programs, see § 40 CFR § 123.25(25). This subsection says, among other things, that denials of requests for

modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. We believe it would be beneficial from an administrative standpoint to include this concept in our own regulations. Accordingly, we propose addition of language in section 61.8(8)(d) as follows:

Permit modification (except for minor modifications), termination or revocation and reissuance actions shall be subject to the requirements of sections 61.5(2), 61.5(3), 61.6, 61.7, and 61.15.^[1] **Where the Division denies an application for any of the above, sections 61.5(2), 61.5(3), and 61.6^[2] shall not apply.** The Division shall act on a permit modification request, other than minor modifications requests, within 180 days of receipt thereof. Except for minor modifications, the terms of the existing permit govern and are enforceable until the newly issued permit is formally modified, or revoked and reissued following public notice.

4. Permit Application Completeness

ISSUE: EPA notes that Colorado's regulations provide that after 45 days an application is automatically deemed complete if the Division has not reviewed it, whereas the federal regulations contain no such provision.

FEDERAL REQUIREMENT:

40 CFR § 122.21(e) states:

(e) Completeness.

(1) The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA administered NPDES programs, an application which is reviewed under § 124.3 of this chapter is complete when the Director receives either a complete

¹ These subsections deal, respectively, with public notice and comment on draft permits, public meetings on draft permits, permit issuance, permit adjudicatory hearings, and permit fees.

² Dealing with public notice and comment on draft permits, public meetings on draft permits, and permit issuance.

application or the information listed in a notice of deficiency.

(2) A permit application shall not be considered complete if a permitting authority has waived application requirements under paragraphs (j) or (q) of this section and EPA has disapproved the waiver application. If a waiver request has been submitted to EPA more than 210 days prior to permit expiration and EPA has not disapproved the waiver application 181 days prior to permit expiration, the permit application lacking the information subject to the waiver application shall be considered complete.

COLORADO'S CURRENT REQUIREMENT AND SUGGESTED CHANGE:

Section 61.5(1)(c) of Colorado's regulations provide: "An applicant shall be advised by the Division not more than forty-five days after the receipt of an application by the Division if, and in what respects, the application is incomplete. Upon failure of the Division to so advise the applicant, the application shall be deemed complete." This mirrors a statutory language found at section 25-8-502(2)(c), C.R.S.

The underlined language above represents a potential inconsistency with federal requirements. Therefore, the Division suggests deleting this sentence from our regulations. We also believe that this proposed change is in the best interest of permit applicants and Division staff from a flexibility standpoint. In reality, there exists a good "give and take" between applicants and the Division throughout the entire application review process. But this change would ensure that the Division could legally request additional information beyond 45 days. The Division would continue to encourage applicants to provide complete information at the time of application, and the Division will still be subject to the 180 day requirement for permit issuance. In order to effectuate this change in the regulations, deleting the same language in the Water Quality Control Act will also be necessary.

5. General Permits -- Automatic Authorization to Discharge

ISSUE: EPA points out that Colorado's regulations authorize discharge regardless of whether the activity qualifies for coverage under a general permit.

FEDERAL REQUIREMENT:

40 CFR § 122.28(b)(2) states, in pertinent part:

(2) Authorization to discharge, or authorization to engage in sludge use and disposal practices. . . .

(iv) General permits shall specify whether a discharger (or treatment works treating domestic sewage) that has submitted a complete and timely notice of intent to be covered in accordance with the general permit and that is eligible for coverage under the permit, is authorized to discharge, (or in the case of a sludge disposal permit, to engage in a sludge use or disposal practice), in accordance with the permit either upon receipt of the notice of intent by the Director, after a waiting period specified in the general permit, on a date specified in the general permit, or upon receipt of notification of inclusion by the Director. Coverage may be terminated or revoked in accordance with paragraph (b)(3) of this section. (Emphasis added).

COLORADO'S CURRENT REQUIREMENT AND SUGGESTED CHANGE:

Section 61.9(2)(b)(iv) of the CDPS regulations currently states: “ Unless a shorter timeframe is specified in a general permit category, if the Division fails to act within thirty (30) days of receipt of the application by the Division, the activity shall be approved under the general permit.”

We believe that inserting “a complete” (and deleting “the”) before “application” would be more consistent with EPA’s approach. Clarifying our current intent that applications must be complete will ensure that the activities applied for are covered and that they are not discharging illegally. Please note that for general permits only, we are also exploring the legal and practical aspects of covering certain activities through “permits by rule,” which would specifically address the issue of when an activity officially becomes covered.